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CRIMINAL PROCEDURE

Introduction

From relative obscurity criminal procedure in recent years has been elevated by the United States Supreme Court to the status of a major national issue, debated not only within the sanctuary of the courtroom but also within the halls of Congress and from the pulpit and editorial pages, as well as upon the street corners of America. No longer are the rights and privileges set forth in the Bill of Rights of interest solely to students of American constitutional history. Now "unreasonable search and seizure", "probable cause", "double jeopardy", "self-incrimination", "due process", "right to a speedy and public trial", "right to confrontation", "right to counsel", and "right of trial by jury" have become familiar terms in the jargon of judges, counsel and police. Procedural errors of a constitutional nature account for a large majority of the prosecutions dismissed, reversed or remanded.

Accordingly, this survey will focus exclusively upon developments in criminal procedure. Necessarily extensive treatment will be given to decisions of the United States Supreme Court, while South Carolina and lower federal decisions will be evaluated in relation to guidelines set forth by the Supreme Court. This survey will also give extensive treatment to major legislation enacted in South Carolina.

I. Guilty Plea

While the simple entry of a guilty plea lacks the dramatic flavor of a courtroom trial, such pleas account for the overwhelming majority — most estimates are in the 85% - 90% range — of convictions obtained in the United States. Until recent years the courts paid scant attention to the guilty plea process. Instead they centered their interest upon safeguarding the rights and privileges of the defendant during the pre-trial custodial and investigatory periods or during the actual trial. Increasingly, however, the guilty plea process has come under fire from many legal writers, with the brunt of criticism falling on the plea bargaining process. Yet most responsible writers continue to recognize that the guilty plea is an essential element in the present framework of criminal administration, marked by too little courtroom space and too few personnel to handle the flood

of criminal trials which even a moderate reduction in guilty pleas would entail. The courts have focused on the actual entry of the plea in order to determine whether the defendant was aware of the nature and consequences of his plea before entering it voluntarily.

In *Boykin v. Alabama*[1] the United States Supreme Court found reversible error where the trial record did not affirmatively disclose that the defendant had voluntarily and understandingly pleaded guilty. The defendant pleaded guilty to five counts of armed robbery and was sentenced by a jury to death. He was represented by counsel at the arraignment, but the trial record failed to reveal whether the presiding judge had examined him as to the circumstances under which he entered his plea. Affirmative judicial inquiry is required, and must be fully shown in the record.[2]

In *Dixon v. State*[3] the South Carolina Supreme Court ruled that, at least in cases where the defendant is not represented by counsel when he enters his plea, the trial judge must conduct more than a perfunctory examination into the validity of the plea. Dixon was represented by counsel during the pre-trial period following his arrest and was advised to plead guilty; however, his counsel was not present when he entered his plea. While recognizing the defendant's right to have the assistance of counsel at the arraignment, the court found that Dixon had validly waived this right.

But because of the complexity of the charges, the court held that the trial judge was obligated to conduct a more thorough inquiry into the defendant's understanding of the consequences of his plea than whether he knew the maximum sentence for the crimes with which he was charged and whether he understood the nature of the offenses to which he was pleading guilty. Dixon, who pleaded guilty to escape, assault with intent to kill and murder, and grand larcency, was entitled to a more precise explana-

1. 89 S.Ct. 1709 (1969).
2. While it is the practice for South Carolina trial judges to conduct an inquiry into the validity of a guilty plea so that *Boykin* will have little practical impact in this state, this decision does invalidate Thompson v. State, 248 S.C. 475, 151 S.E.2d 221 (1966), where the court found no reversible error where the trial court had failed to inquire into the voluntariness of the plea and admonish the defendant as to the consequences of his plea, apparently on the theory that since the defendant was represented by able counsel he must have been informed of the consequences.
3. 168 S.E.2d 770 (S.C. 1969).

tion of the charges in order to determine intelligently whether his admitted conduct warranted pleading guilty to all the charges.[4] Similarly the court should properly have ascertained whether the defendant was aware of any rights or consequences inuring to him under Section 17-553.2 of the South Carolina Code.[5]

A guilty plea gained through coercion, deception, or fraud is clearly a violation of due process, but what constitutes coercion, deception, or fraud is often difficult to determine. In *Townes v. Peyton*[6] the Fourth Circuit Court of Appeals was confronted with the issue of whether a Negro defendant's beliefs, that there was a general pattern of racial discrimination in jury selection procedure[7] and that Negroes accused of raping white females invariably received the death penalty from such juries, were sufficient grounds to constitute a valid claim that his guilty plea was induced through mental coercion. A statistical analysis conducted by the court did not verify the defendant's beliefs. The court ruled that there must be a showing not only that the plea was induced by a fear of the consequences of an unconstitutional policy or practice but also that the fear was grounded in fact.

II. SEARCH AND SEIZURE; ARREST

Judicial interpretation of the fourth amendment has necessarily centered upon the closely related phrases, "unreasonable searches and seizures," and "no warrant shall issue, but upon probable cause . . . ." Behind the enactment of the fourth amendment was a period of American colonial history which had witnessed the frequent employment of warrantless searches and of searches conducted pursuant to a general warrant by British officials. Although all such searches and seizures were not intended to be prohibited, there existed a strong constitutional preference for search warrants and, to a lesser extent, for arrest warrants.

4. For example, the trial court properly should have determined whether Dixon's understanding of the act he had committed warranted and supported a plea of assault with intent to kill and murder, rather than some lesser degree of assault.

5. This section must be read in conjunction with § 17-553.1, which provides for the sentencing of repeated offenders. § 17-553.2 provides that any number of offenses, even though they might be separate and distinct, will be considered as one offense for purposes of imposing sentence pursuant to § 17-553.1, where the offenses are committed in temporal proximity. This section could be applicable to *Dixon,* for the defendant committed the three crimes with which he was accused in one night while engaged in a jailbreak.

6. 404 F.2d 456 (4th Cir. 1968).

7. *See* Whitus v. Georgia, 385 U.S. 545 (1967).

While there are certain narrowly defined situations[8] where warrantless searches will be permitted, the courts have consistently ruled that in the absence of some "grave emergency," a search will be deemed "unreasonable" if it is executed without a warrant.[9]

In *United States v. Rabinowitz*[10] the Court upheld a thorough search without a warrant of the defendant's one room office, under the theory that the police might search "the place" where an arrest was made so long as the scope of the search was "reasonable." In its wake came a flood of state court decisions which construed the *Rabinowitz* holding so liberally that the constitutional preference for a warrant was frequently evaded. *Rabinowitz* came to stand for the bizarre proposition that the police could validly conduct a warrantless search of the defendant's entire house incident to a lawful arrest as long as he was arrested within the house, while a search of a house incident to an arrest outside the house was "unreasonable."[11]

The Court has retreated from *Rabinowitz* by recognizing the fact that police all too frequently were employing an arrest at the defendant's home as a pretense for conducting sweeping warrantless searches. In *Von Cleef v. New Jersey*[12] it ruled that a warrantless search of a sixteen room house made incident to a lawful arrest was invalid even under the standard enunciated in *Rabinowitz*. The Court in *Chimel v. California*[13] sought to define narrow and specific bounds within which police could legitimately conduct warrantless searches incident to an arrest and to thereby restore the strong constitutional preferences for search warrants. In *Chimel* the Court was unwilling to couch its decision in terms of *Rabinowitz* as it had done in *Von Cleef* and *Shipley v. California*.[14] The decision limits the scope of a warrantless search incident to an arrest to the area under the *immediate* control of

8. Most courts will uphold warrantless searches and seizures of automobiles, of premises with the owner's consent, of premises incident to a lawful arrest, or of objects in plain view.
9. *See* McDonald v. United States, 335 U.S. 451 (1948).
10. 339 U.S. 56 (1950).
11. In State v. Porter, 251 S.C. 393, 162 S.E.2d 843 (1968), the South Carolina Supreme Court upheld a warrantless search of the defendant's entire house, including the basement; but in Shipley v. California, 89 S.Ct. 2053 (1969), the police, apparently overeager after awaiting the defendant's arrival for several hours, arrested him in the driveway outside his home and the Court invalidated the subsequent search of the home.
12. 89 S.Ct. 2051 (1969).
13. 89 S.Ct. 2034 (1969).
14. 89 S.Ct. 2053 (1969).

the accused, this being the area in which the defendant could obtain a weapon or destructible evidence. Apparently an area beyond an arm's-length of the defendant would be off limits.

In *State v. Daniels*[15] the South Carolina Supreme Court upheld a seizure without a search warrant of objects lying in the backseat of an automobile. While the issue could probably have been dismissed on the relatively simple ground that the defendant lacked standing to challenge the "search," the court elected to proceed upon the more difficult theory that since the seized evidence was in plain view the police conduct did not constitute a search within the meaning of the fourth amendment. The accused and a companion were stopped for a traffic violation, and since neither had a driver's license, the car was impounded on a city street. Upon learning of a robbery, the police suspected Daniels and his friend and returned to the car, easily observing the implements of the crime from outside the car.[16] The case was decided on the theory that as long as the criminal object may be seen by the police, who are rightfully in the position from which they view it, there is no need for a search warrant to seize the evidence.

In his appeal Daniels raised a second issue, arguing that his right to a fair trial had been denied in that the state had introduced into evidence scrap paper taken without a search warrant from a courthouse office provided for the defendant's use during the trial. The gist of these notes was that the defendant was encouraging several of his witnesses to perjure themselves. The court upheld the use of these notes on the ground that the jury in assessing the credibility of the defendant and his witnesses was entitled to know what took place between them while they were in the office.

This reasoning, as well as the result, appear fallacious in light of recent Supreme Court decisions. In *Katz v. United States*[17] the Court declared that the fourth amendment's protection against unreasonable search and seizure was designed to protect people and not areas.[18] In *Katz* the Court invalidated the introduction of

15. 167 S.E.2d 621 (S.C. 1969).
16. *See also* Harris v. United States, 390 U.S. 234 (1968).
17. 389 U.S. 347 (1967).
18. Here the Court was rejecting the contention that there are certain "constitutionally protected areas" such as the home or office and that when a person is outside of one of these areas he can no longer expect to be protected from warrantless or unreasonable searches and seizures. In arguing that the fourth amendment protects people, the Court maintained that when one is in

evidence obtained by the FBI, without a warrant, where they had bugged a public telephone booth. To the Government's contention that there was no search in the constitutional sense because the booth was public and was constructed largely of glass so that the defendant could be easily observed, the Court replied that by paying to place a call Katz was seeking to exclude the "univited ear" and not the "intruding eye"; he had the right to expect that his constitutional privilege against unreasonable search and seizure would not be violated by a government agent's "seizing" his conversation with electronic devices.

A strong argument can be made that *Katz* is applicable to *Daniels.* By providing the defendant with an office for conferences during the trial, the State obviously recognized his need for privacy. Although the office was within the suite used by the solicitor and was frequented by him and his staff while the defendant was not using it, there is a strong argument that Daniels had a right to believe that his conferences with his attorney and his witnesses were to be private. The invasion of this right would have been more obvious had the State employed electronic eavesdropping devices to overhear the conversation, but by searching the trashbasket the prosecution nevertheless infringed the right to expect that the conferences were to be private.[19]

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an area accessible to the public or segments of the public he may rightfully expect that some of his activities which he seeks to preserve as private will be constitutionally protected.

19. The use of this evidence arguably could have violated Daniel's sixth amendment right to counsel in that an essential ingredient of this right is preparation of the defense without intrusion by the State. In Hoffa v. United States, 385 U.S. 293 (1966), the Court strongly indicated without deciding that it would consider such intrusion in the form of an electronic eavesdropping device (or an informer) planted in the defendant's camp as a violation of the sixth amendment. However, this argument would be less applicable in *Daniels* since his counsel was not present during the conferences in which the scrap paper was produced. *Quaere*: Might not such an intrusion upon a conference between the defendant and his witnesses constitute a violation of the defendant's right to have compulsory process for obtaining witnesses in his behalf? The essence of this right is the defendant's opportunity to have witnesses favorable to his case appear, and such a right would be seriously infringed upon if his conferences with his witnesses were subject to eavesdropping.

It would also appear that defense counsel's contention that the defendant was denied a fair trial was dismissed too lightly. Certainly the use of such evidence constitutes a breach of faith between the defendant and the prosecutor, and it could be argued that thereby the defendant was denied due process of law. In cases like Rochin v. California, 342 U.S. 165 (1952), the Court has adopted the position that where the State's conduct was such as "to offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . ." a reversal of the conviction becomes necessary. *Id.* at 169.

Before a search or an arrest can be made, either with or without a warrant, there must exist probable cause to justify the intrusion upon the individual's privacy. Judicial methodology in determining probable cause is well illustrated in *Spinelli v. United States*.[20] The FBI had obtained a search warrant for bookmaking devices based on information that its agents had observed Spinelli on numerous occasions travelling from Illinois to an apartment in St. Louis, that the apartment had two telephones, that Spinelli was "known" as a bookmaker, and that the FBI had been informed by a "reliable informant" that Spinelli was accepting bets on the two telephones in the apartment. The Court held the search invalid because the information provided did not suffice to establish probable cause for the issuance of a search warrant. The first two statements reflected only innocent-appearing activity and would not alone provide grounds for the issuance of a search warrant; the assertion that Spinelli was "known" as a bookmaker without stating any basis for such a belief was without probative value. The decision hinged upon the issue of whether the informant's tip, taken alone or in connection with the other information was sufficient to establish probable cause. The Court offered two grounds why such information was insufficient. The information did not provide enough detail for a magistrate to determine why the police thought the informer to be reliable and it did not set forth the circumstances underlying the informant's beliefs so that the magistrate could make an independent adjudication of the existence of probable cause.[21]

In *Davis v. Mississippi*[22] the Court reaffirmed the position taken in *Terry v. Ohio*[23] that the fourth amendment prohibition against unreasonable "seizures" of the person is not limited to formal arrests but is also applicable to "investigatory detentions." In *Davis*, the police, acting upon an elderly rape victim's rather unenlightening description of her assailant as a Negro youth, brought in twenty-four Negro youths, including the defendant, for fingerprinting. Even the police conceded that there was no probable cause to believe the defendant to be connected with the

20. 89 S.Ct. 584 (1969).
21. *See also* Recznik v. Lorain, 89 S.Ct. 342 (1968), where the Court ruled that the police did not have probable cause where, acting upon information supplied by unidentified citizens who told of gambling activities at the defendant's residence, the police went there but saw nothing more than a large number of cars parked outside.
22. 89 S.Ct. 1394 (1969).
23. 392 U.S. 1 (1968). In *Terry* the Court held that the fourth amendment was applicable to the "stop and frisk" situation.

crime at the time he was brought in. The Court rejected the State's arguments that since the defendant's detention occurred during the investigatory rather than the accusatory stage of the process there was not a seizure within the context of the fourth amendment requiring probable cause. It held that the fingerprints taken during this period of detention were the product of an illegal arrest and were improperly admitted into evidence.

III. CONFESSIONS

Miranda v. Arizona[24] eliminated the need for a judicial inquiry into the totality of circumstances surrounding a confession in order to determine its voluntary nature. The celebrated *Miranda* warnings must be given only when the defendant is in "custodial interrogation," and the spontaneous or threshhold confession is not within the ambit of *Miranda.* A prime judicial battlefield has been whether a confession made by a criminal defendant while unadvised of his rights was elicited while he was in "custodial interrogation." In *Orozco v. Texas*[25] the defendant was awakened in the early morning by the police, who strongly suspected his involvement in a homicide the previous night. The defendant was briefly questioned in his own bedroom without being advised of his rights. With little hesitation he admitted his guilt and told the officers where his pistol was hidden. Since the defendant was not free to leave while being questioned by the police, the Court held that the *Miranda* warnings should have been given; the warnings are required whenever a person being interrogated is deprived of his freedom of movement to any significant extent. The Court's majority rejected the contention vigorously and persuasively urged by the minority that *Miranda* was applicable primarily to incommunicado interrogation of individuals in a police-dominated atmosphere and that *Miranda* was inapplicable to the *Orozco*-type situation where the defendant was at his home and was not subjected to physical or mental coercion by the police.

In *State v. Redding*[26] the defendant was routinely frisked before being placed in a cell after his arrest. The frisk resulted in

24. 384 U.S. 436 (1966). Under *Miranda* the police, before questioning a criminal defendant who has been taken into custody, must advise the accused of his right to counsel, that the State will provide him counsel if he cannot afford a lawyer, that he may remain silent, and that any statement made by him may be used against him.
25. 89 S.Ct. 1095 (1969).
26. 166 S.E.2d 219 (S.C. 1969).

the discovery of a wallet belonging to the victim of the assault. The defendant spontaneously exclaimed, "That is not mine. I found it on the school bus." The court found no error in the introduction of this statement, for while the defendant was in custody at the time he made the statement he had not been interrogated. The court approvingly cited *Miranda*:

> The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states he wishes to confess . . . ."[27]

IV. LINE-UP

In *United States v. Wade*[28] the Court held that the eyewitness identification of a defendant, adduced at a line-up could not be used at the trial unless the defendant was represented by counsel at the line-up, or had validly waived his right. In *Wade* the Court recognized the line-up as a critical stage in the criminal process, where serious miscarriages of justice could occur unless counsel were present to see that improper or unduly suggestive procedures were not employed. The *Wade* decision was not applied retroactively, however,[29] and a significant number of cases are still arising before appellate courts which must determine the validity of line-up identification under the pre-*Wade* standards.[30] It was for the jury[31] to determine whether the line-up was unfairly suggestive.

In *Foster v. California*[32] the defendant was placed in a line-up with two much shorter men, but the victim was unable to make a positive identification. He was then put into a one-on-one confrontation with the victim, who still was unable to identify him. Finally he was placed in a second line-up, in which he was the only individual to have appeared in both; in this second line-up

27. *Id.* at 224, *quoting* Miranda v. Arizona, 384 U.S. 436, 478 (1966).
28. 388 U.S. 218 (1967).
29. Stovall v. Denno, 388 U.S. 293 (1967).
30. These standards, of course, are still applicable when counsel is present but it is expected that the issue will not arise as frequently since counsel presumably will insist that the police conduct the line-up in a manner nonviolative of the defendant's rights under due process.
31. In some cases, of course, the line-up procedure is so flagrantly defective as to make the identification constitutionally inadmissible as a matter of law. Foster v. California, 89 S.Ct. 1127, 1128 n.2 (1969).
32. 89 S.Ct. 1127 (1969).

the victim saw the light and identified the defendant as the culprit. The Court held that this procedure was so conducive to mistaken identification as to be a denial of due process.

In the South Carolina case of *State v. Lyons*[33] the defendant, unrepresented by counsel, was placed in a line-up with three much taller men. The robbery victim identified him and repeated her identification in court.[34] In order to show the inherent unfairness of this line-up and the subsequent identifications, Lyons' counsel conducted a demonstrative line-up in the courtroom using the same persons as were in the prior line-up. In refusing to reverse the conviction the court stated that the question of whether the original line-up was improperly conducted and whether the subsequent courtroom identification was dependent upon the prior identification at the line-up were factual questions for the jury. Where the court had properly instructed the jury on these issues, the supreme court would not upset its findings of fact.

V. DOUBLE JEOPARDY

In *Benton v Maryland*[35] the Court held that the double jeopardy clause of the fourth amendment was applicable to the states through the fourteenth amendment. Thus sounded the death knell of *Palko v. Connecticut*.[36] In *Benton* the defendant was indicted for burglary and larceny; a jury convicted him on the burglary count but acquitted him on the larceny charge. He successfully appealed his conviction on the burglary charge, and the Maryland Supreme Court ordered a new trial because of an unconstitutional jury selection procedure. The state reindicted Benton on both counts, and he was subsequently convicted of both. The Court held that this practice was unconstitutional as a viola-

33. 154 S.E.2d 445 (S.C. 1968).
34. In Gilbert v. California, 388 U.S. 263 (1967), the Court ruled that an in-court identification could not be admitted into evidence unless it was clear that this identification was not tainted by a prior identification at a line-up in which the defendant was unrepresented by counsel.
35. 89 S.Ct. 2056 (1969).
36. 302 U.S. 319 (1937). In *Palko* the Court ruled that the fifth amendment protection against double jeopardy would not be applied per se to the states; the Court would grant the petitioner relief only if the state procedure violated rights "inherent in the concept of ordered liberty." In the three decades between *Palko* and *Benton* the Court had increasingly approached rejection of this position. *See, e.g.,* Duncan v. Louisiana, 391 U.S. 145 (1968); Washington v. Texas, 388 U.S. 14 (1967); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

tion of the double jeopardy clause.[37] In *Green v. United States*[38] the Court, upon being presented with the same fact situation, had reasoned that "conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy."[39]

In *North Carolina v. Pearce*[40] the Court treated another aspect of the double jeopardy problem — multiple punishments for the same offense. The defendant was convicted and sentenced to ten years. After serving two and one-half years he successfully overturned his conviction and was granted a new trial; he was convicted again and sentenced to twenty-five years without being given credit for the time already spent in the penitentiary. The Court held that the defendant's right against being placed in double jeopardy was violated by the failure to give him the two and one-half years credit.[41]

VI. RIGHT TO A SPEEDY TRIAL

In *Klopfer v. North Carolina*[42] the Court held that the sixth amendment right to a speedy trial was applicable to the states through the fourteenth amendment. In *Smith v. Hooey*[43] the Court sought to determine the extent of the state's obligation to provide an accused a public trial. The defendant was serving time in a federal prison while there were outstanding charges against him in Texas. He frequently petitioned the state to try him on the charges, but the state took no steps to secure his presence, apparently on the theory that since the defendant was serving time in another jurisdiction there was no duty to proceed

37. *Benton* will have an impact on South Carolina practice. This state has followed the rule that where a defendant successfully appealed his conviction on one count of an indictment, he waived the right to avail himself of an acquittal on the second count of the same indictment. He could thus be reindicted and tried on both counts at a new trial. State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950).
38. 355 U.S. 184 (1957).
39. *Id.* at 227.
40. 89 S.Ct. 2072 (1969).
41. While this case does not present a case of multiple punishments for the same offense as usually defined, imagine the situation where the maximum sentence for an offense is ten years. The defendant might then serve three years, successfully appeal and gain a new trial, be reconvicted and sentenced to serve ten years without being given credit for the three already served. Thus he would serve thirteen years for an offense whose maximum punishment is ten years.
42. 386 U.S. 213 (1967).
43. 89 S.Ct. 575 (1969).

with the charges against him.[44] The Court held that Texas had a constitutional duty to make a diligent, good faith effort to bring the accused to trial. Absent such an effort, his right to a speedy trial was violated.[45]

VII. JURY TRIAL

In *State v. Harper*[46] the South Carolina Supreme Court, in accordance with *United States v. Jackson*,[47] held that S.C. CODE ANN. § 17-553.4 (Supp. 1968) which provided that those pleading guilty to capital offenses would be sentenced as though a jury had returned a guilty verdict with a recommendation to the mercy of the court, was unconstitutional. The effect of this statute undoubtedly was to encourage those accused of a capital offense to plead guilty since by doing so the death penalty would be automatically avoided; alternatively, by pleading not guilty, the defendant took the risk that a jury would convict him without recommending mercy and the death penalty would be imposed.[48] Following the reasoning set forth in *Jackson*, the *Harper* court maintained that Section 17-553.4 operated to discourage the defendant's assertion of his sixth amendment right to a jury trial and his fifth amendment right to plead not guilty and that it was therefore unconstitutional.

While *Harper* has the legal effect of preserving inviolate the right to a jury trial by equalizing the risk of the death penalty for pleas of guilty and of not guilty, it has led to a confusion among the South Carolina courts as to how the guilty plea in a capital case should be handled. Apparently some counties will adopt special sentencing juries to impose sentence upon the defendant with the prosecutor and defense counsel urging the jury to recommend mercy. In other counties, the solicitors are adopting the practice used before it was possible to plead guilty to a capital offense. The defendant initially enters a plea of not

44. It is customary for federal prison officials to allow prisoners to be tried on outstanding state charges if the state requests their presence for trial.
45. There is a division among the jurisdictions as to the effect of a discharge of a prisoner on the ground that the right to a speedy trial has been violated. Some states have taken the position that such a discharge would bar a second prosecution on the same or a new indictment on the theory that any other construction would make for a complete evasion of the purpose underlying this provision. Other jurisdictions hold that a discharge would not bar a second prosecution but would merely operate to free the defendant from further imprisonment while awaiting trial. The Supreme Court has not initimated its position on this problem. *See* 21 AM. JUR. 2d *Criminal Law* § 256 (1965).
46. 251 S.C. 379, 162 S.E.2d 712 (1968).
47. 88 S.Ct. 1209 (1968).
48. *See* S.C. CODE ANN. § 16-52 (1962).

guilty and then after the jury is empanelled he withdraws his plea, whereupon the solicitor submits the case to the jury with the request that it return a guilty verdict with a recommendation to the mercy of the court. While decisions such as *Harper* and *Jackson* have been hailed by those opposing capital punishment as a significant step toward its eventual abolition, in South Carolina one question remains unanswered: What happens if the sentencing jury under either procedure outlined above fails to return a verdict with a recommendation to the mercy of the court? Theoretically the trial judge would be bound to impose the death penalty; however, this result might be obviated by the trial judge declaring a mistrial.[49]

VIII. RIGHT OF CONFRONTATION

The right to confront one's accusers, guaranteed by the sixth amendment and made applicable to the states via the fourteenth in *Pointer v. Texas*, [50] has become an active source of constitutional litigation. The issue can arise in many forms, but in whatever context it arises the courts insist that the jury have an adequate opportunity to assess the credibility of those accusing the defendant and that the defendant be able to cross-examine his accusers.

In *Harrington v. California*[51] the Court considered a problem that it had first treated in *Bruton v. United States*.[52] In both cases a co-defendant's confession, highly damaging to the defendant, was introduced into evidence against the co-defendant; the defendant was unable to cross-examine the co-defendant, who refused to take the witness stand. In *Bruton* the Court held that the use of such a confession, even when the trial judge cautions the jury to consider it only against the confessor, violated the defendant's right of confrontation where the confessor did not testify. The confession of a co-defendant is highly damaging to the other defendant, and it is asking too much of a jury to disregard the confession when considering the guilt or innocence of the defendant. In *Harrington* the Court was confronted with the same situation but refused to vitiate the defendant's conviction on the

49. *See* Comment, *Death Penalty Statutes — Guilty Pleas — Sentencing by the Jury*, 20 S.C.L. REV. 841 (1968).
50. 380 U.S. 400 (1965).
51. 89 S.Ct. 1726 (1969).
52. 391 U.S. 123 (1968).

grounds that the introduction of the confession was harmless error within the rule enunciated in *Chapman v. California*.[53]

In *Frazier v. Cupp*,[54] the Court considered a factual situation quite similar to that presented in *Bruton* and *Harrington*. In its opening statements to the jury the prosecution outlined the expected testimony that one of two co-defendants would likely give; however, the co-defendant subsequently refused to testify.[55] Motion for a mistrial, made by the other defendant's counsel at the close of the statement and after the co-defendant refused to testify, were denied; the court charged the jury not to consider the remarks made in the opening statement. In holding that these statements did not constitute a violation of the defendant's right of confrontation, the Court reasoned that the limiting instructions were sufficient to protect the defendant's rights. *Bruton* was distinguished on the ground that "the jury was not being asked to perform the mental gymnastics of considering an incriminating statement against only one of two defendants in a joint trial."[56] The Court found the statement to be only an objective summary of expected testimony, not touted to the jury as being a vital cog in the prosecution's case. The Court was unwilling to accept the defendant's argument that the jury would be so influenced by these remarks that they could not appraise the evidence objectively even after being properly charged not to consider the remarks.

In *Berger v. California*[57] the Court was confronted with another aspect of the right-of-confrontation problem. The Court gave a strong indication of the importance with which it regards this right by holding that its ruling in *Barber v. Page*[58] should be applied retroactively.[59] In both cases the State introduced

53. 386 U.S. 18 (1967). In *Chapman* the Court held that where the defendant's constitutional rights were violated, the use of the fruits of such a violation "must be harmless beyond a reasonable doubt" with the burden upon the state to prove the error to be harmless. *Harrington* is one of the rare cases in which the Court has found harmless error; it deemed the other evidence of the defendant's guilt to be overwhelming and the confession to be only cumulative to other persuasive evidence presented.

54. 89 S.Ct. 1420 (1969).

55. The prosecutor had every reason to believe that the defendant would testify so that the court was not required to consider the question of whether the prosecution was attempting to circumvent the right of confrontation by including "expected" testimony in an opening statement.

56. 89 S.Ct. at 1423.

57. 89 S.Ct. 540 (1969).

58. 390 U.S. 719 (1968).

59. The Court will only apply retroactively those decisions dealing with violations and abuses of one's constitutional rights where the violation detracts from the "integrity of the fact-finding process."

testimony of an absent witness, which was taken at the preliminary hearing. The Court held such testimony to be inadmissible unless the State could show that it had made a bona fide effort to secure the witness' presence. In *Berger* the State had contacted the witness about the impending trial but had failed to subpoena him.

IX. SENTENCING

While the eighth amendment prohibition against cruel and unusual punishment has not been made applicable to the states, the Supreme Court has influenced state sentencing procedures by finding certain procedures violative of other basic constitutional protections. In *North Carolina v. Pearce*,[60] *supra*, the Court confronted the issue of whether the defendant's rights under due process were violated where, after gaining a new trial, he was given a harsher sentence upon a second conviction. While recognizing that there is no absolute constitutional bar to such a practice, the Court saw in this procedure the danger that the defendant might be penalized for successfully overturning his conviction on a procedural technicality. The Court held that a more severe sentence may not be imposed to punish or deter those who choose to avail themselves of their right to appeal; such a practice violates due process of law. In order to insure that the desire to penalize or deter is not the motivating factor behind the imposition of a harsher sentence, the Court ruled that the trial record must affirmatively show the trial judge's reasons for imposing a heavier sentence and that his reasons must be based upon objective information concerning identifiable conduct of the defendant subsequent to his original conviction.

The South Carolina Constitution embodies terms prohibiting cruel or unusual punishment identical to those found in the eighth amendment.[61] The issue usually originates where the defendant claims that his sentence or fine is excessive. Only in rare instances will the supreme court find that a sentence is excessive when it is within the statutory limits.[62]

In *State v. Sanders*[63] the defendant was given the maximum sentence for the convicted offense without being given credit for the ten months spent in jail awaiting trial. In denying the claim that the sentence was excessive, the court pointed out that

60. 89 S.Ct. 2072 (1969).
61. S.C. CONST. art. I, § 19.
62. *But see* State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948).
63. 251 S.C. 431, 163 S.E.2d 20 (1968).

it was within the statutory bounds and there was no evidence that the imposition of the sentence was motivated by any corrupt motive; in view of the defendant's prior criminal record, the imposition of the maximum sentence was not an abuse of discretion.

The court also rejected the defendant's contention that his sentence was excessive because he received the maximum sentence for the crime and yet he was not credited with the ten months spent in jail awaiting trial. Giving such credit is exclusively within the discretion of the trial judge. In no event could the defendant claim that credit must be given as a matter of right, for "presentence time was no part of the punishment imposed" and thus it may not be considered in assessing whether a sentence is "cruel or unusual."[64]

X. LEGISLATION

Since *Gideon v. Wainwright*[65] made it mandatory for the states to provide indigent defendants with counsel in all "serious" cases, non-capital as well as capital, South Carolina in recognizing its obligations under this decision has appointed counsel for indigent defendants in a manner which has often proved unsatisfactory to both the lawyer and the defendant. Upon the determination that a defendant was indigent, counsel was appointed to defend him without pay. Usually counsel was appointed only a day or two before trial, a fact which often made adequate representation impossible. Discontent with this system was reflected in a variety of ways. Criminal defendants frequently claimed that they were the victims of inadequate representation, claims which the South Carolina courts uniformly rejected. The attitude of the courts and the bar was often expressed by a resentment that an able-bodied defendant was unable to secure funds to pay a lawyer.[66]

64. *Id.* at 446, 163 S.E.2d at 228. *Quaere*: Might not North Carolina v. Pearce affect the validity of this decision? In *Sanders* the defendant, while sentenced for a period within the statutory limit, was actually incarcerated for a period in excess of that limit. While the *Pearce* Court faced a different factual situation, the rationale behind the decision could cover the situation presented in *Sanders*. Since Sanders was actually incarcerated for a period longer that the statutory maximum, the double jeopardy approach in *Pearce* may be applicable.

65. 372 U.S. 335 (1963).

66. In State v. Cowart, 251 S.C. 360, 162 S.E.2d 535 (1968), the trial judge upon learning of two able-bodied defendants' indigency postponed their trial until a later term of court so that they might secure funds to pay a lawyer; upon their failure to do so, he proceeded with their trial without appointing counsel. Their conviction was, of course, overturned on appeal, but this incident well reflects the discontent with the existing system.

In 1969 the South Carolina legislature sought to remedy this situation by enacting *An Act to Provide for the Defense of Indigents Charged with a Crime.*[67] The act explicitly recognizes the state's obligation to provide counsel for truly indigent defendants. To determine the defendant's indigency, the act requires that he set forth all of his assets in an affidavit; if he has some assets but not enough to retain counsel, he may be required to pay such assets to the State Treasurer. The appointment of counsel creates a claim against his estate and assets equal to the cost of representation; the court may elect to reduce this claim to a judgment against the defendant's properties.

The act provides for two methods of providing counsel to indigent defendants. Under section four counsel may be appointed much in the same fashion as before the enactment of this bill. Counsel will be paid ten dollars per hour for time spent out of court and fifteen dollars per hour for time spent in court, with the total not to exceed five hundred dollars in a non-capital case and seven hundred fifty dollars in a capital case. The same hourly rates are applicable to post-conviction proceedings with the total for such proceedings not to exceed five hundred dollars.

As an alternative to the system outlined above, section five provides that the bar of each county may choose to establish a public defender system. To finance such a system, the state will provide one hundred fifty dollars for each one thousand persons within the county. Counties electing to have a public defender system may have one or more public defenders as deemed necessary by the county bar. Each public defender will receive a salary not to exceed that of the solicitor of his judicial circuit; the assistant public defenders will receive a salary not to exceed that of the assistant solicitors.

In addition, the state will provide a fund of fifty thousand dollars annually to reimburse appointed counsel, public defenders, and assistant public defenders for necessary expenses incurred in the representation of indigent defendants, as long as the expenses are approved by the trial judge.

While both of these procedures will undoubtedly prove to be more satisfactory than the system employed before enactment of this bill, it is likely that the best results will be achieved by the establishment of public defender systems. Such systems will

67. R445, June 17, 1969.

provide a nucleus of counsel experienced and trained in criminal defense. The creation of such systems will also have the probable result that a lawyer will enter the case at an earlier stage in the proceedings than is the practice now. One weakness of the bill is that it makes no mention of when the defendant's right to appointed counsel attaches and presumably the former practice of appointing counsel within the week of the defendant's trial would continue in those counties adopting the procedure outlined in section four of the act.[68]

XI. BAIL

Historically bail has been a device intended to combine the administration of justice with the freedom and convenience of the accused. While seeking to insure the presence of the accused at trial, it also implicitly recognizes that a person should not be incarcerated before he has been legally convicted, for such incarceration may function to punish innocent persons and certainly detracts from the accused's ability to prepare his defense.[69] In Anglo-American jurisdictions money bail is the standard practice, and all too often bail is set according to an arbitrary schedule which has no real relationship to the true purpose of bail.

Recoginizing the weaknesses inherent in a money bail system, South Carolina adopted a potentially far-reaching act[70] which could conform the bail institution to its actual purposes — insuring the defendant's presence at trial and protecting the community from unreasonable danger, while simultaneously allowing the accused to be at liberty before he is legally convicted.

The act provides that any person charged with a non-capital offense shall be ordered released pending trial on his own recognizance in an amount specified by the court without surety, unless the court determines that such a release will not adequately insure the defendant's presence at trial or that it will create an unreasonable danger to the community. If the court makes such

68. Under present South Carolina practice the defendant is not entitled to have counsel before his trial as long as he is not interrogated or placed in a line-up. He may complain of the delay in appointing counsel only if he can show that he was unable to adequately prepare his case because he was in jail without the benefit of counsel to obtain evidence and interview witnesses. *See* State v. Sanders, 251 S.C. 431, 163 S.E.2d 220 (1968).
69. 8 C.J.S. *Bail* § 31 (1962).
70. R458, June 18, 1969.

a determination,[71] it may impose any one or more of the following conditions of release: (a) require the execution of an appearance bond in a specified amount with adequate surety approved by the court; (b) place the accused in the custody of a designated person or organization which will agree to supervise him; (c) place restrictions on travel, association, or residence of the accused during the period of pre-trial release; or (d) impose any other condition deemed necessary to assure appearance, including a requirement that the accused return to custody at a specified hour. The act is given real teeth by subjecting a defendant who wilfully fails to appear before the court as required to criminal prosecution as well as to forfeiture of any security that he may have posted.

XII. POST-CONVICTION REMEDIES

In criminal law administration it has long been recognized that the area of post-conviction procedure has been beset by inadequacies and confusion resulting from a plethora of remedies, both state and federal, which are inconsistent and indefinite in their application and encourage a deluge of groundless applications for relief, usually in the form of petitions for writs of habeas corpus. A collateral effect of these inadequacies has been long years of illegal confinement for those who have legitmate claims but who are unable to obtain an expeditious hearing. It was to rectify this situation that the National Conference of Commissioners on Uniform State Laws approved the *Uniform Post-Conviction Procedure Act* in 1955. The purpose of this act was to provide a single remedy which would supersede and include all other common law and statutory remedies such as habeas corpus and coram nobis. In 1969 South Carolina adopted this act.[72]

The remedy provided by this act is available to anyone convicted of, or sentenced for, a crime, who claims that: (1) the conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of South Carolina; (2) that the court was without jurisdiction to impose sentence; (3)

71. It is hoped that magistrates will conduct some type of bail hearing in order to make such determinations. To determine what conditions of release will reasonably assure appearance or what release would unreasonably endanger the community, the court should consider the nature and circumstances of the offense charged, the accused's family ties, employment, financial resources, character and mental condition, roots in the community, prior convictions, and previous record of violating bail bonds.

72. R244, May 1, 1969. The form for proceeding under the act was promulgated in Smith's Advance Sheet #31 (Sept. 20, 1969).

that the sentence exceeded the maximum authorized by law; (4) that there existed evidence of material facts, not previously presented and heard, which would require vacation of the conviction or sentence in the interest of justice; (5) that the sentence has expired, that probation, parole, or conditional release has been unlawfully revoked, or that he is otherwise unlawfully detained; or (6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy. This remedy is not available, however, to attack a conviction on the ground that the evidence was insufficient to support the conviction.

The remedy provided in this act does not substitute for or affect any remedy incident to the proceedings in the trial court, nor does it affect direct review of the sentence or conviction. *It is designed to comprehend and take the place of all other common law or statutory remedies available for challenging the validity of the conviction or the sentence; indeed, it is to be used exclusively in place of such remedies.*[73]

A proceeding is commenced by filing an application with the clerk of the court in which the conviction took place. This provision will greatly reduce the burden of the Richland County courts where most petitions for writs of habeas corpus have been entertained; it will reduce the cost of such proceedings since most of the necessary witnesses will be residents of the locality in which the conviction occurred; and it will provide a more meaningful hearing since the trial court is likely to be more familiar with the background and facts of the case.

In his application for relief the defendant must set forth specifically the relief he seeks and the grounds on which he feels entitled to relief. All grounds for relief available to an applicant must be set forth in his pleadings. Any basis for relief which has been finally adjudicated or which has not been raised in his application may not be raised in a subsequent application unless the court finds that the asserted grounds could not have been raised in the original application. The obvious consequence of this provision is to require the defendant to present all of his claims in a single hearing rather than to allow him to besiege the courts with an endless procession of petitions for writs of habeas corpus.

73. This provision does not "suspend" the writ of habeas corpus; it offers a remedy encompassing that which the writ of habeas corpus formerly provided.

The proceedings under this act are quite similar to those in civil proceedings. Within thirty days after the docketing of the defendant's application, the State must respond by answer or motion. Both the defendant and the State may present affidavits in support of their pleadings. The court at any time before entry of judgment may issue orders for amendment of the pleadings, or it may require either party to plead over again. In considering the defendant's application, the court is to be more concerned with its substance than with its form. Where the court is satisfied that the defendant's application has no merit, it may indicate to the parties its intention to dismiss the application; the defendant may then be given an opportunity to reply to the proposed dismissal and the court may allow him to amend his pleadings. Similarly the court may grant either party's motion for summary judgment when it appears from the pleadings, depositions, admissions, and agreements of fact that there is no real issue as to any material fact and that the movant is entitled to judgment as a matter of law.

The hearing to determine the validity of the defendant's claim is designed to provide a speedy and just resolution of the dispute. All rules and statutes applicable to civil proceedings are available to either party, and the court may receive proofs by affidavits, depositions, oral testimony, or other evidence, and if the need arises it may order the defendant to be brought before the court. These provisions are intended to procure a rapid disposal of applications for relief, and for those without merit the defendant will not be permitted to leave the penitentiary. The court is given broad powers to dispose of the application. If it finds in favor of the defendant it is to enter an appropriate order with respect to the conviction or sentence and any supplemental order as to retrial, custody, bail, discharge, or modification of sentence. Thus, an error in the trial need not necessarily effect the release of a guilty party.

The court's order is to be a final judgment from which either party may appeal to the supreme court. Since the defendant will often seek relief in the federal courts after denial of relief under the provisions of this act, the court is required to make specific findings of fact as to each issue presented. This is done in order to assist a federal court in determining whether a federal question exists which will give it jurisdiction to hear the defendant's claim for relief.

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